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In The

Supreme Court of the United States

DEWEY J. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs: *e.g.*, Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?* Cato Policy Analysis No. 216, Oct. 10, 1994; Pilon, *Restoring Constitutional Government*, Cato's Letter No. 9, 1995; "The Court Rediscovers Federalism: Is It the Real Thing?" Policy Forum featuring Ronald D. Rotunda and Lyle Denniston, Sept. 17, 1999. The instant case raises squarely the question of the limits on Congress's power under the doctrine of enumerated powers and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

This brief is co-authored with Professor Ronald D. Rotunda of the University of Illinois College of Law. Professor Rotunda has published voluminously on the subject of constitutional law and is co-author, with John E. Nowak, of the five-volume *Treatise on Constitutional Law*.[1]

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[1] In conformity with Supreme Court Rule 37, the *amicus* has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. The *amicus* also states that counsel for a party did not author this brief in whole or in part; and no person or entities other than the *amicus*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

STATEMENT OF FACTS

On February 23, 1998, petitioner Dewey Jones went to the Fort Wayne, Indiana, home of his cousin, James Walker, who was not home at the time. After telling Walker's wife that Walker was avoiding him, Jones threw a lit Molotov cocktail into the living room of the home, causing fire damage. The Fort Wayne police and fire departments originally investigated the arson, but then notified the federal Bureau of Alcohol, Tobacco, and Firearms, which took over the investigation.

As a result of the latter investigation, a federal grand jury returned a three count indictment against Jones on March 25, 1998, charging him with one count of arson, in violation of 18 U.S.C. § 844(i); one count of making an illegal destructive device, in violation of 26 U.S.C. § 5861(f); and one count of using a destructive device during and in relation to a crime of violence punishable as a federal offense (*i.e.*, the arson charge), in violation of 18 U.S.C. § 924(c). On June 17, 1998, Jones was convicted on all counts in the United States District Court for the Northern District of Indiana. He was sentenced to 35 years in prison – over the objection of Walker that the sentence was excessive and far higher than the sentence Jones would have received in state court. The district court agreed that the sentence, mandated by statutory minima, was "probably . . . excessive." On May 17, 1999, the United States Court of Appeals for the Seventh Circuit upheld the conviction. *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999).

The arson conviction under section 844(i), enacted under the Commerce Clause, was for setting fire to property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." At trial, the government introduced no evidence to show that the Walkers conducted any business in their home or that the home was otherwise "used in" interstate or foreign commerce. Instead, the government introduced three items to satisfy the statute's jurisdictional element. First,

the mortgage on the Walker home was held by an out-of-state company. Second, the company that supplied natural gas to the home received gas from outside the state. Third, the Walkers' insurance company had its headquarters outside the state, although the insurance claim that resulted from the arson was settled by an agent based in Fort Wayne.

The district court held that, under Seventh Circuit precedent, the government was required to show only "a slight effect on interstate commerce" to satisfy the jurisdictional element of section 844(i), and that the natural gas connection alone would suffice. On appeal, the Seventh Circuit conceded that "these interstate connections are pretty slight for a single building; they don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." *Id.* at 480. Nevertheless, the court upheld the conviction for two reasons. First, it simply announced: "the residential housing industry is interstate in character" and arson can substantially affect it. *Id.* Second, "[i]f instead of asking whether 'residential real estate' substantially affects commerce we ask whether 'arson of buildings' or even 'arson of residences' substantially affects commerce, the answer must still be yes. . . . Most of these arsons also affected gas, electric, and telephone service, required the occupants to stay at hotels while repairs were completed, . . . led friends and loved ones to travel from other states to give comfort to the victims, and so on. This collective effect . . . permits the national government to establish substantive rules of conduct." *Id.* at 481.

The Seventh Circuit acknowledged that its decision conflicted with decisions of the Ninth and Eleventh Circuits that "have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences," *id.* at 480 (citing *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), and *United States v. Denalli*, 73 F.3d 328 (11th Cir.), *modified on other grounds*, 90 F.3d 444 (1996)).

SUMMARY OF ARGUMENT

The basic question in this case is whether Congress is authorized, under its power "[t]o regulate Commerce . . . among the several States," to make the arson of a private residence, which is already a crime in every state, a federal crime.

The Constitution establishes a government of delegated, enumerated, and thus limited powers, leaving most powers, including the general police power, with the states or the people. Under the Articles of Confederation, states had erected protectionist barriers that were interfering with the free flow of commerce among them. It was to break that logjam, in large measure, that a new constitution was written. The Constitution's Commerce Clause, in particular, gave Congress the power to override such barriers: under it, Congress could regulate – or make regular – commerce among the states. Indeed, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the nation's first great Commerce Clause case, this Court upheld a federal statute that did just that.

Today, however, that functional understanding of the Commerce Clause has been largely eclipsed, replaced by a far broader, nonfunctional conception that enables Congress to exercise what is, in effect, a general police power. Invoking its power to regulate interstate commerce, Congress today regulates virtually anything and everything, for reasons not remotely related to ensuring the free flow of goods and services among the states. In doing so, it pays lip service to the Constitution by announcing findings that the activity it wants to regulate – carjacking, arson of churches, violence against women, what have you – "affects" interstate commerce; alternatively, Congress includes a "jurisdictional element" in its statute, which amounts to asking courts to discern a similar connection on a case-by-case basis. Those processes, which involve piling inference upon inference, are a charade, and everyone knows it. This Court said as much when it observed recently, for the first time in nearly 60 years,

that if it were to accept the government's arguments, the Court would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *United States v. Lopez*, 514 U.S. 549, 564 (1995). And that would require the Court to conclude, it added, "that the Constitution's enumeration of powers does not presuppose something not enumerated. . . . This we are unwilling to do." *Id.* at 567-568. Given those "first principles," the Court found in *Lopez* that Congress had no power to prohibit the possession of a gun near a school because such possession "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567.

Those principles govern here too. This is a relatively simple case. Petitioner Jones was convicted of, among other things, setting fire to his cousin's private home, a state crime of arson that Congress made a federal crime under section 844(i), invoking its commerce power to do so. But arson of a private home "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." The activity regulated here does not pass the threshold test: it is not an "economic activity" or "commerce" as those terms are ordinarily understood.[2] It is not "interstate commerce" anymore than any purse snatching (or the aggregate of all purse snatchings) is "interstate commerce." It is common law arson, plain and simple.

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[2] Thus, *Perez v. United States*, 402 U.S. 146 (1971) is inapplicable. That case upheld the Consumer Credit Protection Act, 18 U.S.C. § 981 et seq. An extortionate credit transaction is a commercial activity. An arson (particularly an arson that is not an arson for hire) is not a commercial activity. Moreover, the evidence in *Perez* showed that a large part of the income of organized crime is "generated by extortionate credit transactions." There was no such showing in this case, nor could there be. An arson of a private home, unconnected to organized crime, is no more interstate commerce than a barroom brawl is interstate commerce.

Nor does the jurisdictional element in the statute save things. To satisfy that element, the government introduces the out-of-state mortgage, the out-of-state insurer, and the receipt of gas produced outside the state, all to show that the home was "used in interstate or foreign commerce or in an activity affecting interstate or foreign commerce." The home was not "used in" interstate or foreign commerce. Nor was it "used in" an activity affecting interstate or foreign commerce – unless mere residency is understood as "affecting" such commerce, in which case merely "to be" is "to affect." The "activity" that the home was "used in" was "residing." If Congress can regulate residing on so thin a ground it can regulate anything – and its powers are plenary. But this Court has announced many times that the federal government's powers are enumerated, not plenary.

The government is engaged here in the kind of transparent bootstrapping that is all too familiar in Commerce Clause cases. Indeed, it is precisely the kind of charade this Court cut through in *Lopez*. Under the substantial effects test this Court articulated there, section 844(i) cannot be applied in this case. At a deeper level, however, the difficulty of applying that test in a principled way – and in a way, in particular, that preserves our system of dual sovereignty – should give the Court pause about the correctness and practicality of the test and encourage it to move toward the original, functional understanding of the Commerce Clause.[3]

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[3] The federal government also has implied powers, of course, but those powers must be derived from an enumerated power. If the commerce power does not entail a particular power, then nothing is gained by invoking the Necessary and Proper Clause. Cf. *New York v. United States*, 505 U.S. 144 (1992).

ARGUMENT

I. COMMERCE CLAUSE JURISPRUDENCE SHOULD BE CONSISTENT WITH CONSTITUTIONAL THEORY AND DESIGN.

In this Court's most recent Commerce Clause case, *United States v. Lopez*, 514 U.S. 549 (1995), Chief Justice Rehnquist's opinion for the Court begins with the basic premise of the Constitution: "We start with first principles. The Constitution creates a Federal Government of enumerated powers." *Id.* at 552. It then quotes Madison's famous words from Federalist 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* And it concludes by observing that to uphold the government's expansive reading of its commerce power, the Court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

In the present case, the government is asking the Court "to pile inference upon inference" in order to uphold the application of a federal arson statute, enacted under the Commerce Clause, that for all intents and purposes is little different than the garden variety arson statutes all states have enacted under their general police powers. *See* Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295 (1986). Given those many state statutes, the first question that arises is why it should be necessary for there to be a federal statute covering the identical ground. In its Brief at the petition stage, the government does not address that question; perhaps it assumes that redundancy in criminal statutes raises no problems, theoretical or practical. *See* Rehnquist, *The 1998 Year-End Report on the Federal Judiciary* (1999); AMERICAN

Bar Ass'n, Task Force on the Federalization of Criminal Law (1998).[4]

More deeply, however, neither the government's Brief nor the opinion below makes any effort to address the profoundly important issues of constitutional theory and structure that this Court raised in *Lopez*. The most important of those issues can be cast as a simple question: How can a single clause of the Constitution, the Commerce Clause, be read to subvert the very theory and structure of the document in which it rests? Stated differently, if the Constitution does indeed create a government of enumerated powers, few and defined, leaving most powers with the states or the people, how can one clause in it so undermine that plan?

The problem has not gone unnoticed, of course. In fact, a very recent study has pointed to what is perhaps the most important source of the problem: "Scholars have almost uniformly concluded that workable judicial rules of decision cannot be derived from the phrase 'Commerce among the several States.' " Nelson and Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues* 85 Iowa L. Rev. 1, 7 (1999) (forthcoming). Indeed, the rules the modern Court has derived have led one of the nation's most prominent constitutional scholars to observe that "[t]he Court's application of its substantial effect and aggregation principles in the period between 1937 and 1995, combined with its deference to congressional findings, placed it in the increasingly untenable position of claiming the power to strike

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[4] Proponents of section 844(i) may argue that it is needed to prevent arson, but that is plainly wrong. Not surprisingly, the government introduced no evidence to show that states are unable to prohibit arsons due to, say, jurisdictional limitations. This federal law does not appropriate one extra dollar to hire more FBI agents to investigate residential arsons. Its purpose, apparently, is to convince voters that Congress is against arson.

down invocations of the Commerce Clause, while at the same time applying a set of doctrines that made it virtually impossible actually to exercise this power." Laurence H. Tribe, *American Constitutional Law* 816 (2000).

Lopez raised issues that have too long been ignored if constitutional government is to endure. Justice Thomas, in his concurrence in that case, said as much when he observed that the Court's decisions have "drifted far from the original understanding of the Commerce Clause," adding that the substantial effects test, "if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula." *Lopez*, at 584 (Thomas, J., concurring). The modern understanding of the Commerce Clause undermines the Constitution's plan for limited government and dual sovereignty. Given that inconsistency, the modern understanding cannot be correct.

A. The Constitution Establishes a Limited Government.

Nothing could be more clear than that the Constitution establishes a government of limited powers. The federal government's powers were delegated by the founding generation and enumerated in the Constitution. By virtue of that enumeration they are limited. That understanding is implicit in the very first sentence of Article I: "All legislative Powers *herein granted* shall be vested in a Congress of the United States . . . " (emphasis added); by implication, not all powers were "herein granted," as Article I, section 8, makes clear. Thus, the Constitution begins with the idea of limited power. And it ends with it too, for the initial point is recapitulated, as if for emphasis, and made explicit in the final documentary evidence of the founding period, the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved to the States respectively, or to the people." Although the Tenth Amendment has been called "but a truism," *United States v. Darby*, 312 U.S. 100, 124 (1941), *New York v. United States*, 505 U.S. 144, 156 (1992), it is a truism with a bite; for it makes it plain – not least by its prominence as the Framers' final founding statement – that the Constitution establishes a government of delegated, enumerated, and thus limited powers.

The testimonial evidence supporting that understanding would be more tedious than difficult to cite. In Federalist 39, for example, Madison wrote that "[The national government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary of inviolable sovereignty over all other objects." Again, in Federalist 45 Madison wrote that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people. . . . " And even before the Tenth Amendment was added to the Constitution, its point was articulated by Hamilton in Federalist 32: "the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor . . . is clearly admitted by the whole tenor . . . of the proposed Constitution." In sum, the new Constitution was understood by all to be instituting a government of limited powers.

Indeed, nothing could better demonstrate that the powers of the new government were meant to be limited than the debate surrounding calls for the addition of a bill of rights. Fearing that the federal government would not live within its enumerated powers, many in the founding generation, especially during the ratification debates, called for such a bill – for extra protection. Those opposed raised two main objections. First, a bill of rights was not necessary, due to enumeration. Second, because it would be impossible to enumerate all of our rights, the enumeration of some would be construed, by ordinary

principles of legal construction, as implying that rights not so enumerated were not meant to be protected. The Ninth Amendment was the remedy for the second objection: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In elaborating the first objection, however, Hamilton drove home the limiting effect of enumeration when he wrote in Federalist 84: "Why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"

Nevertheless, to secure the Constitution's ratification by all of the states, a bill of rights proved ultimately to be necessary, of course. In truth, however, the Bill of Rights was, as some have since noted, an afterthought – however much it may have served over the years to better secure our liberties. Indeed, we went for two years without a bill of rights, secure in the belief that enumeration was our first line of defense against overweening government. Enumeration can serve that function, however, only as long as the powers enumerated are themselves understood as limited. Should one or a few prove to be effectively unlimited, enumeration is an empty promise.

B. The Commerce Clause Was Meant Not Only to Be Limited but to Serve Limited Government.

The Commerce Clause provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As but one of the several powers delegated to Congress – as enumerated in Article I, section 8 – it must be understood in that context. In particular, it cannot be understood in a way that would render those other powers superfluous.

In his concurrence in *Lopez*, Justice Thomas made that point with great force when he wrote that this Court's

"substantial effects" test for determining the scope of the Commerce Clause, coupled with the Court's reading of the Necessary and Proper Clause, renders Congress's other Article I, section 8, powers "wholly superfluous." After listing several such powers, he concluded:

> Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians. . . . Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. *Lopez*, at 588-589 (Thomas, J., concurring).

From a consideration of constitutional design alone, therefore, the scope of the commerce power must be understood to be limited. If the Commerce Clause is read as it most often is today, to effectively eviscerate the doctrine of enumerated powers, it is read not simply wrongly but fundamentally so. For such a reading eviscerates nothing less than limited constitutional government itself. A government that can regulate virtually anything and everything is not a limited government.

But there are other reasons too that compel the conclusion that the Commerce Clause was meant not only to be limited but to serve limited government. Several such reasons were brought out in Justice Thomas's discussion in *Lopez*, but one crucial point needs to be added – a point that Chief Justice Marshall himself made in *Gibbons*, but then never really developed. The issue in that case was whether a federal law licensing ships to engage in the "coasting trade," under which Gibbons operated, preempted a New York law granting a 30-year monopoly, held by Ogden, to ply the waters between New York and New Jersey. The effect of New York's monopoly grant, of

course, was to preclude Gibbons from operating under his federal license. Throughout his opinion, Marshall is concerned to give the text of the Commerce Clause, and the Constitution more generally, an accurate reading. Toward that end, however, he begins his argument not with the text but with a discussion about how to interpret constitutional text. Thus, he is concerned to avoid not only "an enlarged construction" but a "narrow construction, which would cripple the government, *and render it unequal to the object for which it is declared to be instituted. . . . " Gibbons v. Ogden*, 22 U.S. 1, 188 (1824) (emphasis added). Marshall's focus, plainly, is on the very purpose of the government the Constitution creates. He continues in that vein: "If . . . there should be serious doubts respecting the extent of any given power, it is a well settled rule, *that the objects for which it was given . . . should have great influence in the construction.*" Finally, to the same effect: "We know of no rule for construing the extent of such powers [as the commerce power], other than as is given by the language of the instrument which confers them, *taken in connexion with the purposes for which they were conferred.*" *Id.* at 188-189 (emphases added).

Clearly, Marshall thinks it important not simply to engage in textual analysis but to go behind the text for illumination – to inquire about the "objects" or "purposes" for which the Constitution's powers, and the Constitution itself, were instituted. Only so, he suggests, will we be able to reach a true "construction." Unfortunately, however, he never really engages in the larger, more complete inquiry he commends. Instead, he turns immediately to the text, focusing on the words "commerce" and "among." His initial concern is to show that "commerce" includes navigation, not mere "traffic" or the interchange of commodities. He is correct, of course, but in his effort to show that, the closest he comes to giving a functional account of the Commerce Clause is to say that

"[t]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government. . . . " *Id.* at 190. That is true, and important, but it doesn't really amount to a functional account; for Marshall's use of "objects" here connotes more the *subject* of regulation than the *reason* for it. One wants to know not simply that the people of America adopted their government to give it power over commerce – important as that is – but *why* they wanted to give it power over commerce. What was their purpose in doing so? Without knowing that, we are left to focus on the meanings of "commerce" and "among," which are of limited value for understanding the commerce power – much less for restraining it, as history has shown.

Why then did the people of America want to give the federal government power over interstate commerce (which was indeed one of their primary reasons for adopting a new constitution)? The answer is well known, even if it is invoked in the Commerce Clause context today mostly in "dormant" or "negative" commerce clause cases. That "clause" is not really found in the Constitution, of course, yet the idea behind it is what led to the actual Commerce Clause. Under the Articles of Confederation, the weak national government was not only ill equipped to deal with foreign affairs, including commerce, but domestic affairs as well, especially commerce. In the name of local interests, states were erecting all manner of protectionist barriers to the free flow of commerce. As Madison put it in Federalist 42, "The defect of power in the existing confederacy, to regulate the commerce between its several members . . . ha[s] been clearly pointed out by experience." In Federalist 11, Hamilton remarked that the states had "fettered, interrupted and narrowed" commerce. Under the new plan, he continued, "[a]n unrestrained intercourse between the states themselves will advance the trade of each, . . . [and] [t]he veins of commerce in every part will be replenished

. . . from a free circulation of the commodities of every part." And Justice Johnson made the same observation in his concurrence in *Gibbons*, which Justice Stevens cited just two years ago: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." Cited by Stevens, J., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) (citation omitted).

Under the Articles of Confederation, numerous calls had been made to address the problem. As early as 1781, for example, the Confederation Congress, without success, asked for "a right of superintending the commercial regulations of every state, that none may take place that shall be partial or contrary to the common interest. . . . " Jonathon Elliot, 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 92-93 (1901). Finally, in 1786 Virginia asked the states to send delegates to Annapolis to discuss "how far a uniform system in their commercial regulations may be necessary to their common interests and permanent harmony." *Id.* at 115. The Annapolis meeting in February of 1787 would lead to the convention in Philadelphia that summer, to the new Constitution, and to the Commerce Clause, which was meant to bring order out of chaos. It was meant to break the stranglehold of the states over commerce by vesting in Congress the power to regulate – or make regular – commerce among them. It was "an investment of power for the general advantage," as Marshall would later put it, *Gibbons* at 189, aimed at "harmony" among the states. (*See* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986): "There is much evidence that the main point of this grant (unlike the grant of power over foreign commerce) *was not to empower Congress, but rather to disable the states*. . . . The framers wanted commerce among the states to be free of

state-originated mercantilist impositions." *Id.* at 1125.) (emphasis added).

Thus, Marshall was quite right to be concerned that the federal government not be "crippled" and rendered "unequal to the object for which it is declared to be instituted." *Gibbons* at 188. That concern, however, should not be read, as some have, as a call for expansive government. That is not what Marshall said. On the contrary, the "object" for which the government was instituted, in this instance, was to *reduce* government – *state* government that interfered with free trade.[5] Indeed, Marshall's application of the Commerce Clause in *Gibbons* was precisely as intended by those who wrote the clause – to override a state measure that frustrated free commerce. That is the principal function of the clause. But that function also limits its scope. The Commerce Clause did not grant a power to regulate anything for any reason – provided only that Congress could show some connection with commerce. Rather, it had a relatively specific purpose – to enable the federal government to ensure the free flow of goods and services among the states.

There are several implications of this more complete, functional understanding of the Commerce Clause that need to be noticed. First, if the principal function of the clause is to enable the federal government to ensure free trade, the assumption is that commerce is a matter undertaken, for the most part, among private individuals and firms, not among governments – except insofar as they may be acting as market participants for their own relatively limited purposes. That implication is consistent

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[5] The parallels with section 5 of the Fourteenth Amendment are instructive. There too Congress is given power to "enforce," by appropriate legislation, the provisions of section 1 that prohibit states from abridging, depriving, or denying in the ways there listed. Congress's power is meant thus to *limit* (state) government.

with economic arrangements at the time the Constitution was written, with the recent war that had been fought in large part to cast off mercantilist restrictions on trade, and with the anti-mercantilist ideas of Adam Smith, whose *Wealth of Nations*, published in 1776, was taking hold in America at the time. Commerce, in short, is a private sector matter, with government enforcing the rules, not playing in the game. In particular, a functional understanding of the Commerce Clause does not envision Congress as authorized to engage in the kind of central economic planning, much less social engineering, that many nations around the world pursue, which would amount to the antithesis of free economic arrangements.

Second, if commerce is mostly a private sector matter, with government enforcing the rules, there is no reason to suppose that government must make the rules – much less that the federal government should do so. Under our common law system, most of the rules of commerce began as informal customs or conventions. They evolved over centuries and have simply been "recognized," and sometimes modified, by courts and legislatures as the need arose. *See* F. Hayek, 1 *Law, Legislation, and Liberty* 72-93 (1973). Under our system of limited government, therefore, there is a strong presumption that people can regulate their own affairs, and that government is necessary only when that presumption fails, leading to a case or controversy that is brought before a court. Moreover, only when enough such controversies indicate a larger problem do legislatures ordinarily step in to modify a rule, and then only to the extent necessary to address the problem. Thus, until very recently, at least, courts have played the larger role in shaping the rules of commerce. But just as there is a presumption in favor of private regulation of commerce (and much else besides), and a presumption in favor of courts over legislatures, so too

there is a presumption in favor of state courts and legislatures over federal institutions. There is no reason to suppose, that is, that in most cases state courts and legislatures, being closer to most problems, are not perfectly able to fashion those rules of commerce they may need to fashion as problems arise – especially since they can take local circumstances into account as they do so.

Third, the fact that Congress *was* given the power to regulate commerce among the states suggests that there was in fact a problem that states were unable to handle. But the very language of the Commerce Clause – pertaining to commerce *among* the states – suggests also the extent or limit of the problem. Thus, given the presumptions just noted, the commerce power was hardly meant to be plenary. Rather, it was meant to be limited to the problem that gave rise to it, with due deference to private and state regulation where any particular problem proved insufficient to warrant congressional action. The Necessary and Proper Clause, read not simply as authorizing means to Congress but as limiting those means to such as are both necessary and proper, is a constitutional recognition of our system's presumptions. In sum, Congress has the power to address the problem of impediments to interstate commerce. The power arises, however, only if there is such a problem; and it extends only to that problem. It is not a free-ranging power, untethered to the kinds of problems that brought it into being.

Finally, although the problem that gave rise to the commerce power limits its scope, there is more than one way the power may operate within that scope. In its "dormant" mode, for example, the commerce power acts simply as a negative – to preempt state measures that interfere with free trade among the states. If it had wanted to, Congress could have legislated affirmatively to accomplish the same end. Instead, courts secure that end simply by reading the clause functionally, in effect. In

a case like *Gibbons*, however, an affirmative federal licensing scheme accomplished that end. There, Congress had simply secured the right to trade of those who met the minimum requirements set by the scheme, as a result of which the inconsistent state statute had to fall. But there may be occasions when more substantial affirmative regulation is needed. After all, many if not most of the rules of commerce noted above, whether crafted privately or by public institutions, clarify and secure the rights and obligations of parties engaged in commerce. Accordingly, courts and legislatures called upon to enforce or craft such rules are engaged in classic police power functions: they are securing rights regarding property, liberty, and contract. Insofar as it may be necessary for Congress to exercise its commerce power, therefore, it may be necessary for it to engage in such police power functions too. That is not to say, however, that Congress has a *general* police power under the Commerce Clause. Rather, such police power as is entailed by the Commerce Clause is incidental, and bounded by the function of the clause – to secure the free flow of commerce, primarily against state interference, but also against structural impediments that states, alone or together, may be unable to address.

In its affirmative mode, therefore, the commerce power is twice limited. The police power that is entailed by the affirmative commerce power is limited, as just noted, by the function of the parent commerce power; that function limits the commerce power to situations that make its use necessary. But the entailed police power is restrained in addition by the same restraints that apply to the general police power. In its most fundamental conception, the police power, as Locke observed, is the "Executive Power" that each of us has in the state of nature to secure his rights, which we yield up to government when we constitute ourselves as a people. J. Locke, *Second Treatise of Government* ¶ 13 (1690). Thus, it is bounded by the rights we have to be secured. We cannot

use it to accomplish other ends. We cannot condemn private property for public use under the police power, for example; that has to be done under the eminent domain power. The police power is for securing rights – here, the rights of commerce, where states are interfering with them, or where states may be unable themselves to secure them, which would make it both necessary and proper to employ the police power the Commerce Clause entails for the limited purpose of ensuring the free flow of commerce, as authorized under the Commerce Clause.

Madison was right, therefore, when he wrote, late in life, that the domestic commerce power "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government . . . " (3 M. Farrand, *The Records of the Federal Convention* 478 (1911) (reprinting a letter from Madison to J. Cabell, Feb. 13, 1829)). That comment, however, has often been misunderstood. The commerce power was indeed intended as a "preventive provision against injustice among the states." And it was not meant "to be used for the positive purposes of the General Government" – certainly not as it is used today. But the "negative and preventive" use of the power refers to the *purpose* of the power, not to the character of the means employed under it. Congress can certainly take affirmative action under the clause – as it did in *Gibbons* – for the "negative" purpose of preventing restraints on commerce. That is a far cry, however, from using the power to pursue all manner of "positive" purposes – or public policies – unrelated to freeing the flow of commerce among the states.

As noted above, however, the commerce power is bounded as well by the need to legislate in the first place. Thus, under a functional account, if there is no problem pertaining to the free flow of commerce, no legislation is authorized. Indeed, if there is no such problem, and the

rights of commerce are secure, any legislation would be beyond the scope of the commerce power and might even be aimed at securing the kinds of protectionist and redistributive ends the Commerce Clause was written to foreclose. In that case, not only would such legislation not be necessary as a means of securing the purposes of the Commerce Clause, but in undermining those very purposes it would not be proper either. The Commerce Clause was written to limit government's role in the marketplace, not to expand it. It was written to enable the federal government to play the role, essentially, of a policeman. It was written and meant to free commerce, not to hobble it. Properly understood and applied, it serves a crucial function in a Constitution designed to limit government and free commerce.

II. EVEN AS UNDERSTOOD TODAY, THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO PROHIBIT THE ARSON OF A PRIVATE RESIDENCE.

Although Marshall never developed the more complete, functional account he commended in *Gibbons*, the result he reached there, on narrower grounds, was not only right but consistent with a more complete account. At the same time, the narrower, textual approach he took has colored our understanding ever since, with all but predictable results. Thus, his focus on the meaning of "commerce" enabled courts for some time to prohibit Congress from regulating manufacturing, mining, agriculture, and other activities that are not commerce but are closely related to it; that distinction eventually broke down, however, as courts allowed regulation not only of those but of more remote activities that still "affected" commerce. And his focus on the meaning and application of "among" has also led to the effects test as Congress has increasingly regulated intrastate commerce and other activities that "affect" interstate commerce. As a result,

Congress has used its commerce power to regulate more and more of life, often in ways that do not deal with commerce at all (this arson case, for example), or in ways that not only do not free commerce but actually hobble it.

The great watershed in Commerce Clause jurisprudence came during the New Deal, of course, with President Roosevelt's notorious Court-packing scheme. Prior to that time the Marshall approach held the line, for the most part, against efforts by Congress to expand its regulatory power under the Commerce Clause. A host of "progressive" ideas came together during the New Deal, however, including notions of majoritarian democracy and judicial restraint, in the face of which the narrow, textual account fell apart. There followed a vast expansion of Congress's regulatory power under the Commerce Clause, primarily under the effects test. Nevertheless, even today, and especially after the Court put a brake on the expansion of the commerce power in *Lopez*, Congress does not have the power to prohibit the arson of a private residence.

Chief Justice Rehnquist's review in *Lopez* of Commerce Clause history and his discussion of modern Commerce Clause doctrine are sufficient to show why Congress has no such power. As he notes, although the New Deal cases "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under the Clause," even those cases confirm "that this power is subject to outer limits." *Lopez*, at 556-557. Concerned, in particular, not to create "a completely centralized government" (*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)), the modern Court undertook to decide, he argues, "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, at 557. Consistent with that structure, the Court has identified "three broad categories of activity that Congress may regulate under its commerce power:" the "channels

of interstate commerce;" the "instrumentalities of interstate commerce, or persons or things in interstate commerce;" and "those activities having a substantial relation to interstate commerce, *i.e.*, those things that substantially affect interstate commerce." *Id.* at 558-559 (citations omitted). Rehnquist admits that the Court's case law "has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce" to come under the commerce power; but he concludes, consistent with the "great weight" of the Court's case law, "that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559.

Rehnquist then turns to the question before the Court in *Lopez*, whether the Commerce Clause authorized Congress to enact section 922(q) of the Gun-Free School Zones Act, which banned the possession of a gun near a school. Quickly disposing of the first two categories as not relevant to the question, he concludes that if section 922(q) were to be sustained, it would be because the prohibited act substantially affected interstate commerce. But section 922(q), he notes, "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic activity, however broadly one might define those terms." *Id.* at 561. And later in the opinion he adds, to the same effect: "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567.

In the statute before the Court, section 844(i), which prohibits arson, is in all relevant respects identical to section 922(q), except that section 844(i) contains a jurisdictional element, meant to "ensure, through case-by-case inquiry, that the [arson] in question affects interstate commerce." *Id.* at 561. Given that element, it falls to the government to show, in this case, that the arson was of a property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce,"

much as it fell to the government in *Lopez* to show generally that gun possession near a school affected interstate commerce.

In this case, the government introduced no evidence to show that the Walker home was "used in interstate or foreign commerce" – at least as that concept is ordinarily understood. The home was used as a residence, not as a business. If to reside is to use one's residence in interstate commerce, it is hard to imagine any activity or any thing that cannot be reached by the commerce power. But neither was the home "used in an activity affecting interstate or foreign commerce" – the only leg of the jurisdictional element that would seem to apply here – unless we are prepared to say that *every* activity affects interstate or foreign commerce, which at some level, of course, is true. It is at this point that the government piles "inference upon inference" – the out-of-state mortgage, the out-of-state insurer, the receipt of gas produced outside the state – to try to show that the home is used in an activity that affects interstate commerce. But again, that amounts to saying nothing more than that residing, which in the modern world involves those connections, affects interstate commerce, which is true, once again, but trivially so. And this Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id.* at 559 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27). Indeed, were the government to prevail with its argument, we could imagine two arsons, one involving a home like the Walkers', the other involving a home with in-state insurance, solar heat, and no mortgage. The first arson would be a federal crime. The second would not. Those are the kinds of absurdities one finds down this road. And the issue here is hardly novel. Indeed, in 1800, confronting a bill to federally charter a copper mining company, Jefferson saw that such an interpretive method,

used with the Necessary and Proper Clause, would destroy the idea of a limited federal government: "Congress [is] authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played 'This is the House that Jack Built?' " (Quoted in C. Warren, *The Supreme Court in United States History* 501 (1922)).

Thus, whether Congress tries to draw the connection through findings, as in *Lopez* (where no such findings were ever made), or the Court tries to draw it in a case like this (where a jurisdictional element is involved), the issues are the same. Chief Justice Rehnquist put it plainly in *Lopez* when he said that "[s]ection 922(q) is a criminal statute that by its terms has nothing to do with commerce. . . . " *Lopez* at 561. Section 844(i) is a criminal statute that by its terms tries to pass as a regulation of interstate commerce. It will not work. This is not a regulation of commerce. It is an ordinary, garden variety police power statute, dressed up as a regulation of commerce.

But what about the "class of activities" approach the government advances in its Brief at the petition stage? Even if the connection with interstate commerce may be slight in a given case, the government argues, citing this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within the class." Brief at the petition stage, 5 (citing *McLain* at 245). Moreover, the government continues, "considered in the aggregate," residential arsons "have a substantial effect on interstate commerce" (citing FBI statistics about the total costs of residential arsons). *Id.* at 6. Thus, "[b]y including a jurisdictional element in Section 844(i), Congress defined a

category of arson offenses that are connected to interstate commerce, and that accordingly may be considered as a class to establish a substantial effect under *Lopez*." *Id.* at 6-7. Finally, citing a recent Eleventh Circuit opinion, the government argues that " '*Lopez* does not require a substantial effect on interstate commerce to result from each individual criminal act,' but only that the relevant class of activity – 'arson of property used in commerce or used in an activity affecting commerce' – exert a substantial effect." *Id.* at 8 (citing *United States v. Dascenzo*, 152 F.3d 1300, 1303, n. 6 (11th Cir. 1998)). (The court below takes a similar "class of activities" approach in this case.)

That argument is patently circular. Indeed, the "class of activities" approach, together with its aggregation method, proves everything and therefore nothing. Start with the statute: it criminalizes, in relevant part, the arson of "any building . . . used in . . . any activity affecting interstate or foreign commerce. . . . " Read naturally, that means that the statute applies *only if* the building in question is used in an activity affecting interstate or foreign commerce. If the government cannot prove that for *this* building, the statute does not apply. But the fact that the statute speaks of buildings thus used implies that there is a class of buildings *not* thus used – otherwise there would be no point in singling out this class. If that is so, then aggregating those "non-affect" arsons will still not produce arsons that, even in the aggregate, affect interstate commerce. No matter how many zeros you aggregate, the sum is still zero. But if the effect on interstate commerce of the arson of *this* building is in fact not zero, but still trivial, then aggregating all such arsons in order to satisfy the substantial effects test of *Lopez* amounts to an end run around *Lopez*. For if even the most trivial effects, when aggregated, constitute a substantial effect, then it follows, since no act is without

some effect, that there is no class of buildings not in interstate commerce, and the whole point of the substantial effects test – to distinguish proper from improper applications of the Commerce Clause – is undermined. Finally, the government claims that the power to regulate a "class of activities" includes the power to regulate individual activities within the class. True, but that begs the question by assuming that the regulated activity is within the class – precisely the point that has to be proven. If the Walker home is not *itself* used (non-trivially) in an activity affecting interstate commerce, it is not within the class; and any effort to bring it within the class by aggregating arsons of all such properties in order to meet the *Lopez* substantial effects test is bootstrapping, plain and simple.

The deeper problem with this approach, however, was pointed to by Justice Thomas in his discussion in *Lopez* of the "class of activities" approach. *Lopez* at 600-602. The problem is with the "substantial effects" test itself. As Thomas wrote early in his concurrence, "The Commerce Clause does not state that Congress may 'regulate matters that substantially affect commerce . . . ;' " indeed, he continued "the Framers could have drafted a Constitution that contained a 'substantially affects interstate commerce' clause had that been their objective." *Id.* at 587-588 (Thomas, J., concurring). They did not. They drafted a constitution that gave Congress the power to regulate – or make regular – commerce among the states. Understood in that basic, functional way, Congress has the power to take such measures as may be necessary or proper to ensure the free flow of commerce among the states. It does not have the power to prohibit actions that in no way impede such commerce or, if they do, are already addressed by the states.

The Court's "substantial effects" test is simply not suited to addressing the issue in that kind of principled way. But for that matter, neither are the "channels" or "instrumentalities" legs of the modern Commerce Clause triad suited to the task. They address the "objects" of regulation rather than the *object* or *purpose* of regulation. Indeed, just as the Founders did not write that Congress may regulate matters that substantially affect commerce, so too they did not write that Congress may regulate the channels and instrumentalities of commerce. Their simple statement – that Congress shall have the power "to regulate Commerce . . . among the several States" – keeps the focus on "regulate" as much as on "commerce" and "among." When the focus shifts to the *objects* of regulation, the question – "Regulation to what end?" – gets lost. When that happens, it is hard to stop the expansion because the point of having the power in the first place has been lost.

With *Lopez*, the Court finally drew a line in the sand. But its argument took the form of what might be called a "limited" *reductio ad absurdum*. The Court said, in effect, that the government's conclusion, arguably drawn from the Court's Commerce Clause jurisprudence, contradicts the basic premises of the Constitution and so cannot stand. Rather than look searchingly at its underlying jurisprudence, however, the Court limited itself to saying that *this* conclusion or implication does not follow. That is a limited, essentially defensive response. It does not go to the heart of the matter. It retains, as an affirmative theory of the Commerce Clause, the "triad" that approximates the Court's record over the years. At this time, perhaps the Court is not prepared, for practical reasons, to grasp the nettle. In time, however, if the Court is going to extricate itself, and the nation, from the untenable implications of that record, it will need to set forth an

affirmative theory of the Commerce Clause that is grounded in those principles.

We all know what is going on in this case. This is just one more in a long series of federal criminal statutes that Congress has enacted to "look tough on crime," oblivious to any constitutional restraints on its power or any implications for state and federal courts. The effects test that has brought us to this juncture flows from a substantial misreading of the Commerce Clause. It needs to be addressed in a serious way because it is fundamentally inconsistent with our first principles as a nation.

CONCLUSION

This case, involving the simple matter of residential arson, raises profoundly important constitutional questions concerning the division of powers between the federal and state governments and the limits of federal power. The Constitution created a system of dual sovereignty and limited federal government. The Commerce Clause was meant to serve that plan by enabling Congress to ensure the free flow of commerce among the states. When the clause is read with that purpose in mind, it serves a crucial function in our system of limited government and individual liberty. When it is read to enable Congress to regulate all manner of activities far removed from that end, it is fundamentally misread. If our system of dual sovereignty and limited government is to endure, the Court must exercise the authority it has to secure the nation's first principles. Nearly two centuries ago, Chief Justice Marshall stated well the central issue in this case: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained." *Marbury v. Madison*, 5 U.S. 137, 176 (1803). Congress having no power to enact the statute at issue in

this case, the decision of the court below should be reversed.

Respectfully submitted,

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